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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems.	)	R. 97-10-016
Order Instituting Investigation on the Commission's Own Motion into Monitoring Performance of Operations Support Systems.	)	I. 97-10-017

SIMPLIFIED SUMMARY OF CLEC PERFORMANCE INCENTIVES PROPOSAL (WITH BACKGROUND/SUPPORT)

Dated: February 1, 1999

DC01/BUNTR/74210.1

Pursuant to the ALJ's Ruling of January 26, 1999, AT&T Communications of California, Inc. (U-5002-C), ICG Telecom Group, Inc. (U-5406-C), MediaOne Telecommunications of California, Inc. (U-5549-C), MCI WorldCom, Inc., NorthPoint Communications, Inc. (U-5829-C), Covad Communications (U-5752-C), Cox California Telcom, LLC (U-5684-C), the California Cable Television Association and Electric Lightwave, Inc. (U-5377-C) (collectively "the CLECs") submit a simplified summary of their performance incentives proposal, with supporting background material.

Dated: February 1, 1999

Respectfully submitted,

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On behalf of AT&T Communications of California, Inc., ICG Telecom Group, Inc., MediaOne Telecommunications of California, Inc., MCI WorldCom, Inc., NorthPoint Communications, Inc., Covad Communications, Cox California Telcom, LLC, the California Cable Television Association and Electric Lightwave, Inc.

A. Specific criteria for determining imposition of incentives

The CLECs' incentives plan establishes two levels of incentives, plus a forgiveness plan and a procedural cap:

- Tier I constitutes incentives payable directly to an individual CLEC, based upon the number of missed submeasure performance results in a particular month.
- Tier II constitutes incentives payable to the State's general fund, based on missed submeasure performance results for the CLEC industry as a whole in a particular month.[1]
- The forgiveness plan addresses concerns about random variation.
- The procedural cap protects the ILEC from high incentives without Commission review.

Tier I Incentives

This tier addresses missed submeasures for an individual CLEC, calculated on a monthly basis. The incentive payment must be made to the CLEC within 15 days of a reported violation. Submeasures are the individual, disaggregated reported results for each measure. Incentives would vary depending on the severity of the miss (i.e., the number of standard deviations by which the submeasure is missed). In addition, higher incentive payments are applicable if the reported result for the performance measurement is found to be out of compliance for three (or more) consecutive months.

Thus, the following table delineates the Tier I incentive payments due to the affected CLEC when parity analysis applies:

Computed value of the modified Z-statistic	Monthly incentive (per submeasure) for one miss	Monthly incentive (per submeasure) for misses of three (or more) consecutive months
1 < modified Z-statistic <= 3	\$10,000	\$50,000
Modified Z-statistic > 3	\$50,000	\$50,000

The CLECs' Benchmark proposal reflects a critical value set at zero. The benchmark itself is set at the minimal acceptance level of performance. The table below contains an "ordinary" or non-severe violation (\$10,000) in which the ILEC misses the benchmark for a submeasure but the ILECs' performance deviates less than 10 percent from the benchmark level. The severe incentive encompasses those instances in which the ILECs' performance deviates 10 percent or more from the benchmark level. For example, if a benchmark standard for a certain submeasure is 95 percent within 4 days and the ILEC provides 90 percent 4 days, an ordinary incentive would apply because

[1] "Missed performance results," in the case of both Tier I and Tier II, is when the actual performance result for the CLEC (Tier I) or CLECs as an industry (Tier II) is worse than the relevant analogous retail performance of the ILEC or the benchmark level of performance, whichever is applicable.

it is more than 85 percent, but less than 95 percent (the benchmark). Should the ILEC only meet a 80 percent within 4 days performance, then the severe incentive would apply. If such low performance continues for three or more consecutive months, the higher incentive ($50,000) would apply in either case. Pacific has agreed with this structure.[2]

When benchmarks are used, the following table would apply:

If benchmark missed, number of individual events (per submeasure) missing the benchmark	**Monthly incentive (per submeasure) for one miss**	**Monthly incentive (per submeasure) for misses of three (or more) consecutive months**
More than one occurrence, but fewer than 10% of occurrences	$10,000	$50,000
10% or more of occurrences	$50,000	$50,000

Tier II Incentives

The Tier II incentives constitute a regulatory fine, paid to the state general fund, designed to deter the ILECs from engaging in conduct that suppresses competition from the CLEC industry. Tier II incentives are calculated as follows:

Calculate the performance result for each submeasure using the aggregation of data for all CLECs. Compute the modified z-statistic for each submeasure and determine how many of the computed z-statistic results exceed the critical value based upon a Type I error rate of 15%. Based upon the number of results where the critical value is exceeded (for performance within the report month) and based upon the total number of performance results computed, determine if, at a 95% level of confidence, the number of failed results exceeds the number that would be expected to fail due solely to random variability of the results. If the threshold is exceeded, then Tier II incentives are applicable.

For example, if there is data for 100 results evaluated, then the threshold would be approximately 20 missed submeasures; if there is data for 1000 results, the permissible number of failures due to randomness is approximately 170. Total missed submeasures that exceed this threshold would cause Tier II incentives to apply.

Tier II incentives are calculated using the following table:

Number of times Threshold is exceeded	**Applicable Tier II incentive**
One finding in last 3 months	$.50/access line
Two findings in last 6 months	$1.00/access line
More than two findings in last 12 months	$2.00/access line

[2] Pacific Bell's Performance Remedies Plan at 6.

When a Tier II incentive becomes due, it should be paid by the ILEC into an interest-bearing escrow account. If no further Tier II violation occurs for the next 20 months,[3] then the money would be returned to the ILEC. If a new Tier II violation occurred within 20 months, all escrowed money would be paid out of the account into the State general fund and the new Tier II incentive would be paid into the escrow account, triggering the start of a new 20-month escrow period.

Mitigation

Pacific's proposal belabors its exaggerated exposure to risk from random variation and seeks every opportunity to avoid incentives in all circumstances. Pacific seeks "forgiveness" to mitigate random variation, "forgiveness" for force majeure conditions, "forgiveness" through a root cause analysis process and "forgiveness" through a CLEC measurement penalty plan. The ILECs should be required to make incentive payments to affected CLECs under the CLEC's proposal which already includes a generous "forgiveness" plan and a limited root cause analysis.

Forgiveness Plan

The CLECs and Pacific have proposed the same forgiveness plan. The CLECs view this plan as a significant compromise and response to Pacific's alleged harm incurred due to random variation. The CLEC's forgiveness proposal is necessarily conditioned on the entire performance remedy proposal and cannot be viewed independently. Incentive obligations would be forgiven, on a submeasure basis, only when the following conditions are met:

- One forgiveness per submeasure is provided each six months
- No more than two forgivenesses can be accrued per submeasure
- A forgiveness can only be used to offset the incentive payment due for the same submeasure for which the forgiveness was originally provided
- If a forgiveness is available it must be used at the first opportunity, with the following exceptions:
- Available forgivenesses may never be used in consecutive months
- Available forgivenesses may never be used to offset either a severe (critical value > 3) or a chronic (3 or more consecutive months) miss on a particular submeasure

[3] The actual number of months to be used would be determined based on the confidence level that is chosen. In the example used here, one would expect that, on a random basis given perfectly compliant performance by the ILEC, only one failure would occur over a 20 month period (using a 95% confidence level).

Limited Root Cause Analysis

Once a lack of parity has been documented in the monthly performance reports sent to the CLECs, Pacific should immediately pay the incentive amount to the CLEC. If Pacific provides a root cause analysis to the CLEC within 30 days of submitting the report, and both the CLEC and Pacific mutually agree that Pacific was not at fault for the lack of parity, then the incentive payment gets returned to Pacific. If the CLEC disagrees with Pacific's root cause analysis and believes the parity determination was correct, the CLEC retains the incentive payment.

Procedural Cap

If the total Tier I incentives payments due to all CLECs within a single month are less than $10,000,000, then the incentive amounts will be due and paid automatically. If the total computed Tier I incentives for that month exceeds $10,000,000, the ILEC may request an expedited hearing to determine whether the amounts exceeding $10,000,000 should be paid out by the ILEC. In the event that such a request is made, the first $10,000,000 of Tier I incentives would be paid out in proportion to the total amount due to each CLEC to which incentives are owed.

When calculating whether the total computed incentives within one month exceeds $10,000,000, Tier I incentives applicable to either severe (critical value > 3) or chronic (3 consecutive months) misses, as well as Tier II incentives, should not be included.

Other incentives issues

If the ILEC fails to submit performance reports to any CLEC or the Commission by the 15th day of the month, or submits reports that it later revises, the following incentives apply and are payable to the State general fund:

- If no reports are filed, $25,000 per day past due;
- If incomplete or revised reports are filed, $1,000 per day for each missing or revised performance result (the number of elapsed days are counted from the original date that the data was due until the date the missing or revised data was actually provided).

All incentives, payable to either the CLEC or the State general fund, are due within 30 days, absent action by the Commission; otherwise additional incentives in the amount of $5,000 per day are also payable to the party to whom the original payment was due.

B. Statistical methodology

The CLECs agree with Pacific to use a modified z/t-test to assess parity of performance.

Sample size

The minimum sample size should be set at 10.[4] Although the assumption of a normal distribution requires a larger sample size, an alternative method -- the permutation distribution -- can be used for smaller sample sizes to generate the probability distribution and calculate the corresponding z statistic.

Critical value and alpha value

The critical value for parity tests should be set at 15%, which automatically sets the critical value at approximately 1 standard deviation. For performance measures in which benchmarks, rather than parity tests, are used, the critical value should effectively be set at 0.

C. Measures to which incentives will be applied

The parties have agreed on the measures to which incentives should be applied.

D. Prerequisites for incentives to apply

No prerequisites should exist. Instead, incentives should apply in the first month in which data is available and in which non-parity is found to have occurred.

E. Exceptions to incentive assessments

There should be no preset exceptions to incentive assessments.

F. Forecasts/trending

Pacific takes the business position that it may be unprepared to deal with sudden and substantial surges in CLEC order activity that it could not have reasonably foreseen. CLECs oppose Pacific's suggestion that forecast accuracy serve as a basis for mitigation. A specified maximum volume becomes a *de facto* barrier to CLEC entry into the local market.

CLECs oppose Pacific's suggestion that forecast accuracy serve as a basis for mitigation. Pacific's trending proposal is also unacceptable for the same reasons outlined below. Furthermore, for a competitive market to develop, growth cannot be constrained by the 20% limit that Pacific proposes. Incentives should remain in place even in the absence of such a limit.

Pacific's rationale for seeking forgiveness from incentives (or even worse, propose CLEC payment of incentives to Pacific) is faulty from at least three perspectives.

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[4] Because of the special nature of collocation, the CLECs recommend that the performance measures for collocation be excluded from the minimum sample size requirements.

First, Pacific now has more than two years of actual experience and data from CLEC forecasts and ordering volumes. The affect on Pacific of any individual CLEC's forecast inaccuracy would be small, and Pacific alone is in the position to aggregate CLEC forecasts and "adjust" those forecasts based on past CLEC order volumes.

Second, Pacific is virtually invulnerable to any conceivable fluctuations in CLEC order volumes because of Pacific's deployment of mechanized OSS, its claims of vast capacity of that OSS and Pacific's development of flow-through for high-volume order types.

Third, history has shown that fluctuations in CLEC demand are largely controlled much more by Pacific than CLECs, for example the inability of Pacific to process CLEC orders mechanically and Pacific's development of flow-through capability for the orders it receives.

For all the reasons stated above, the Commission should reject Pacific's attempt to excuse its obligations to pay incentives based on outdated claims that fluctuations in individual CLEC demand make it difficult for Pacific to plan for those fluctuations.

G. Expedited dispute resolution

The CLECs propose a fast track dispute resolution procedure:

- Before a party may initiate fast track DR, the complainant must prove that it asked the defendant to fix the problem and gave it a reasonable opportunity to do so before filing the complaint. The process also builds in a mandatory mediation session before hearings are held.

- Under normal circumstances, an evidentiary hearing, after discovery, is held 30 days after the complaint has been filed, and a Commission order would be effective 66 days after filing of the complaint.

- If the presiding officer agrees with the complainant that an expedited ruling is warranted by commercial considerations, an evidentiary hearing may be held two weeks after the complaint was filed and a Commission order would be effective approximately 5 weeks after filing.

- An order necessary to protect the public or preserve the status quo may be issued within 48 hours of the filing of a complaint.

H. Applicability of performance incentives to Section 271

If Section 271 approval has not yet been recommended for Pacific by the CPUC, a Tier II violation should result in a denial of such a recommendation. The CPUC should not issue a Section

271 approval for Pacific until six months has elapsed without another Tier II violation. (Note: if the CPUC has recommended Section 271 approval but the FCC has not yet acted, the CPUC should withdraw its recommendation for the same six month period.)

Second, if Pacific has received Section 271 approval from the FCC, a Tier II violation should cause the CPUC to undertake an investigation into the question of recommending to the FCC that Pacific's Section 271 approval be suspended.

I. Exclusive remedy

Monetary performance incentives are not the exclusive remedy available to address Pacific's service problems.

BACKGROUND/SUPPORT FOR CLEC INCENTIVES PROPOSAL

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A. Specific criteria for determining imposition of incentives

Most of the negotiations sessions centered on trying to reach a consensus on the incentives structures, and on the highly related issue of mitigation. To continue the spirit of collaboration and in an effort to close the distance between the CLECs' and Pacific's positions on these issues, the CLECs are willing to adopt positions that they offered during the course of negotiations. Accordingly, the CLECs offer an incentives proposal, which addresses many of Pacific's criticisms of the CLEC proposal in the October 5, 1988 Report (the "Report").

The CLECs would not oppose an incentives plan that establishes two levels of incentives (Tier I and Tier II). The first tier constitutes incentives payable directly to an individual CLEC, based upon the number of missed performance results in a particular month. The second tier constitutes incentives payable to the State's general fund, based on missed performance results for the CLEC industry as a whole in a particular month.[5]

Tier I Incentives

The CLECs' Tier 1 proposal is not vastly different from that contained in the CLECs' position in the Report. Based on discussions with other CLECs and with Pacific, the CLECs lowered the incentive amount for a single miss so as to minimize the financial impact on the ILEC due to random variation. The goal, as stated in the Report, is to cause the ILECs to provide service parity, not to penalize the ILEC based on random variation.

Tier II Incentives

In the Report, the CLECs proposed both a Tier II and a Tier III incentive. Again based on extensive discussions with other CLECs and Pacific, the CLECs, in the spirit of collaboration, would not oppose elimination of the original Tier II incentives (aimed at more widespread discrimination), but continue to recommend adoption of what had been referred to as Tier III incentives.[6] The CLECs believe if the Tier I incentives they have proposed are adopted in conjunction with meaningful industry-wide incentives, then the imposition of additional incentives can be held in abeyance until actual experience is gained with the incentive plan.

The Tier II incentives constitute a regulatory fine, designed to deter the ILECs from engaging in conduct that suppresses competition from the CLEC industry. Because they are regulatory fines, they are paid to the state general fund rather than to an individual CLEC.

[5] "Missed performance results," in the case of both Tier I and Tier II, is when the actual performance result for the CLEC (Tier I) or CLECs as an industry (Tier II) is worse than the relevant analogous retail performance of the ILEC or the benchmark level of performance, whichever is applicable.

[6] Thus, for the purposes of the remainder of this document, what was previously described as Tier III incentives in the Report will now be referred to as Tier II incentives.

Thus, the CLECs (and consumers) benefit through the incentives created for the ILECs to operate in a pro-competitive manner, but on the other hand, CLECs receive no direct monetary benefit from application of Tier II incentives.

Tier II incentives are triggered if the number of missed performance results, based on the aggregate experience of the CLECs, exceed the threshold level that would be expected to occur on a random basis (using an extremely conservative Type I error risk).[7] The Tier II incentives are also designed to escalate if the CLEC industry is repeatedly treated in a discriminatory manner.

The CLECs concede that there is a remote risk of random variation resulting in a Tier II incentive liability. Accordingly, the CLECs would accept that when a Tier II incentive becomes due, it should be paid by the ILEC into an interest-bearing escrow account and paid as described in the summary proposal.

Forgiveness Plan for Tier I Incentives

The CLECs initially opposed any mitigation plan for random variation because each proposal allowed the ILEC substantial opportunities to game its performance to CLECs. The CLECs still contend that random variation only harms the ILEC in the case where the ILEC is actually providing compliant performance on each and every measurement result. If the ILEC is not providing completely compliant performance, then random variation affects both the ILEC and the CLECs equally (provided the Type I and Type II error risks are balanced).

Thus, it is only in the hypothetical, yet ideal, circumstance of the ILEC providing perfectly compliant performance on each and every measure that the impact of random variation disproportionately affects the ILEC. Nevertheless, in a collaborative spirit, the CLECs have agreed to include a forgiveness plan in their proposal. The CLECs believe their proposal is the only one that comes close to reasonably mitigating the impact of random variation, while not creating unprecedented opportunities for the ILEC to abuse the credit process.

Procedural Cap

The CLECs also will not object to the use of a procedural cap. This cap can be used as a further tool to mitigate ILEC financial liability resulting from the unlikely occurrence of sizeable incentive payments due solely to random variation. The procedural cap would allow the ILEC to obtain Commission review if the monthly performance incentives exceed a pre-specified amount.

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[7] The actual number permissible will be dependent upon the Type I error rate adopted and the number of results evaluated but, in any event, the threshold can be explicitly calculated in advance and documented in a table format. Tier II incentives will apply whenever the previously calculated threshold is exceeded in a particular month.

Finally, incentives need to be adopted to ensure that performance reports will be accurate and timely. In addition, incentives need to exist to ensure timely payment by the ILEC. Thus, the CLECs propose that the Commission adopt provisions that address these conditions as well.

B. Statistical methodology

Sample size

Valid statistical tests can be performed with a sample size as small as 6, but during the course of the meetings the CLECs agreed, in an effort to compromise, that the minimum sample size be set at 10. Although the assumption of a normal distribution requires a larger sample size, an alternative method -- the permutation distribution -- can be used for smaller sample sizes to generate the probability distribution and calculate the corresponding z statistic. Under the set of performance submeasures that the parties have agreed to, it is reasonable to assume that many, if not all, CLECs will have small sample sizes for at least some submeasures. The higher the minimum sample size is set before the results of the test are considered valid, the more tests are excluded from being subject to incentives and even being performed at all.

Even with a minimum sample size of 10, there will be instances where individual CLECs will have less than 10 events in a given month for a given submeasure. The CLECs propose that CLEC data that falls below the minimum be aggregated across time for that CLEC, i.e., combine one month's data with the next month's data, and so on, until the minimum sample sizes is achieved. The CLEC result would then be compared to Pacific's result for the same time period.[8]

The number of "expected random failures" is a function of the total number of results utilized within a particular month's evaluation. Thus, any situation that results in the exclusion of measurement result(s) from consideration – whether due to small sample size or other exclusions – must then also result in an appropriate downward adjustment to the threshold number of failures that determine when penalties are applicable.

Critical value and alpha value

In the Report, the subject of statistical methodology was divided into three subtopics: modified z/t tests, critical value and alpha value, and sample size. The CLECs have not modified their position on the modified z/t tests nor on sample size, but they have done so on the critical and alpha values. The CLECs continue to assert that the critical value for parity tests be set at 1 standard deviation.

[8] Because of the special nature of collocation, the CLECs recommend that the performance measures for collocation be excluded from the minimum sample size requirements, including aggregation over time.

However, for performance measures in which benchmarks, rather than parity tests, are used, the critical value should effectively be set at 0. Because a benchmark level should be the minimally acceptable level of performance that will permit an efficient competitor with a meaningful opportunity to compete, no performance that is worse than the benchmark level should be tolerated.

The CLECs are willing, at the outset, to set a uniform critical value for determining whether parity exists on any measure. This is so even though the CLECs believe that a measure-specific critical value, as calculated through the Equal Risk methodology, would be fairer and more accurate. The CLECs will accept a standard deviation of 1 for parity measures because it tends to balance the Type I and Type II errors.

A benchmark standard is inherently different from a strict parity standard. Rather than being a comparative measure, a benchmark is a specific minimum performance level that must be provided at all times. Benchmarks are also based on the incumbent local exchange carriers' ("ILECs'") historical data. Thus, it is a reasonable expectation that the ILEC should exactly meet or exceed the benchmark.

To permit other interpretations puts the CLECs in an extremely vulnerable position. Their competitor, the ILEC, could be treated as though it were in compliance with a benchmark level of performance even if the performance delivered to the CLECs becomes highly variable. This should not be tolerated because the benchmark threshold should be a minimum level of acceptable performance for the particular function being measured.[9]

C. Prerequisites for incentives to apply

The process for applying incentives should be simple and easy to understand. No prerequisites should exist. Instead, incentives should apply in the first month in which data is available and in which non-parity is found to have occurred. This is true for all existing and for any new measures, disaggregations, products or services, and systems and processes. The processes that support CLEC services presently are, for the most part, mature processes. Changes or enhancements should be pretested which would minimize fluctuations in service even when changes are made.

Certainly, if Pacific prevails in its advocacy that application of penalties should be delayed until the fourth measurement period, an even more lengthy period should be required before the performance supporting a section 271 application can be accepted. Indeed, if Pacific is indicating that its results will not be trustworthy until three months after the report month, then the section 271 procedure should give relatively little weight to any submitted

[9] A statistical test should not be used in conjunction with benchmarks unless the following deficiencies can be remedied. The z statistic calculation involves the CLEC variance in the denominator. The larger the CLEC variance, the smaller the z statistic value. Hence, the ILEC would have an incentive to provide a high degree of performance variability to the CLEC if a statistical test were used with benchmarks.

result, as part of a section 271 application, that predates the application by three months or less.

D. Exceptions to incentive assessments

There should be no preset exceptions to incentive assessments. Instead, any assertions by Pacific that incentives should not have to be paid should be addressed as part of a root cause analysis.

Specific exceptions due to acts by the end user, CLEC or its agent have already been accounted for in each submeasurement where appropriate as can be seen by the definition of the measurement itself. Therefore, Pacific's concern related to failure to act, either on the part of the end user or the CLEC, have already been cared for and no further adjustment is necessary.

The CLECs oppose a blanket "exception" for causes beyond Pacific's reasonable control because this would provide excuses for performance measurements where the CLECS and Pacific have previously concluded that no exclusion is warranted. Force majeure events are also to be dealt with in the root cause analysis. If equity requires relief from incentives, and the event was not cared for though the definition or exclusion and the impact upon Pacific is material and on-going, then relief can be provided on a case by case basis through application to the Commission for a waiver of the particular incentive payment.

E. Expedited dispute resolution

The operation of the performance incentives plan may depend upon the determination of facts or action by a party. In the event of a dispute, the parties desire an expedited process to enforce the incentives plan. There is no process at the CPUC that guarantees parties a decision within the timeframe necessary to promote the essential incentive nature of this plan.

We propose a fast track dispute resolution (DR) procedure for the Commission's consideration. It incorporates all of the procedural due process protections normally provided to parties at the Commission.

- Before a party may initiate fast track DR, the complainant is required to prove that it asked the defendant to fix the problem and gave it a reasonable opportunity to do so before filing the complaint. The process also builds in a mandatory mediation session before hearings are held.

- Under normal circumstances, an evidentiary hearing, after discovery, will be held 30 days after the complaint has been filed, and a

Commission order would be effective 66 days after the filing of the complaint.

- If the presiding officer agrees with the complainant that an expedited ruling is warranted by commercial considerations, an evidentiary hearing may be held two weeks after the complaint was filed and a Commission order would be effective approximately 5 weeks after filing.

- An order necessary to protect the public or preserve the status quo may be issued within 48 hours of the filing of a complaint.

The following procedures and timelines for the DR process should be used:

SERVICE:

Service of any pleading, demand, request, response, or notice under this procedure will be made by delivery in-hand to the recipient or its authorized representative and by either e-mail or fax. All pleadings should be served upon the respondent, the executive director, and the general counsel of the Commission at the time of the filing.

NOTICE:

The petitioner must provide at least 48 hours' advance notice of petitioner's intent to seek fast track dispute resolution and allow respondent at least 48 hours to correct the situation.

VERIFICATION:

The petition must include a verification that the 48 hour notice was given and that the respondent did not correct the situation as requested. A copy of the letter giving notice and any response must be attached as an exhibit to the petition.

DISCOVERY:

Any party seeking discovery shall serve its written discovery concurrent with the filing of the party's initial pleading in the case. Notices of deposition may be served separately. Responses to discovery must be provided to the propounding party within 14 days after the request for discovery was served. Objections to any discovery request, along with a copy of the objectionable request, shall be served on the propounding party and filed with the Commission with the objector's next pleading, and in any event, no later than seven days after receipt of the discovery request.

ALJ DETERMINATION AND PREHEARING CONFERENCE:

Within 48 hours of the filing, the ALJ will determine which timeline will apply to the petition, standard or expedited. If emergency relief is sought, the ALJ will either grant or deny such relief at this time. If evidentiary hearings are warranted, a PHC will be held within 14 days after the answer is filed. The PHC may be conducted by telephone. At the PHC, the parties will determine whether the ALJ or a designee will serve as the hearing officer. The ALJ will resolve all discovery disputes, establish a schedule for completion of discovery, and attempt to resolve the primary dispute through non-binding mediation.

EMERGENCY RELIEF:

The ALJ's decision on emergency relief will have the force and effect of an order of the Commission. The order granting emergency relief will remain in effect during the pendency of the underlying action and until all review, reconsideration, or rehearing of Commission's order with respect to the matter has been exhausted, or until subsequent order of the hearing officer or of the Commission.

EVIDENTIARY HEARING:

A determination as to reasonable grounds for the petition and a notice of evidentiary hearing shall be issued within 3 days after the date on which the answer is filed. The hearing will begin within 30 days or 15 days of the petition's filing, depending on whether the standard or expedited procedure is used. Evidence may be either written or oral, and a record of the hearing will be made.

DECISION OF THE PRESIDING OFFICER:

The written decision will be issued within 45 days after the date on which the petition is filed. It will include reasons for the disposition of the complaint, and if necessary, the assessment of performance incentives and directions for action.

RATIFICATION BY COMMISSION ORDER:

The decision of the presiding officer will be adopted by the Commission at its next regularly scheduled public meeting and shall be effective no later than 21 days after issuance by the presiding officer, unless the Commission enters its own order within 20 days of the decision of the presiding officer.

RECONSIDERATION AND APPEAL:

OF HEARING OFFICER'S DECISION DUE TO PROCEDURAL FAILURE OR ERROR OF LAW OR FACT:

The aggrieved party must file within 3 days of the issuance of the hearing officer's decision. The other party has 3 days within which to respond. The Commission may issue an alternate to the hearing officer's decision within 20 days of the issuance of the challenged decision, but if the Commission has not adopted an alternate by the 21st day, the hearing officer's decision becomes final.

OF COMMISSION'S DECISION (NOT APPLICABLE TO EMERGENCY ORDERS)

An application for rehearing may be filed within 15 days of the Commission's decision. Any response may be filed within the next 15 days. The Commission may act on the application for rehearing within the next 15 days; otherwise, the application is deemed denied and may be subject to judicial review.

Timelines for Fast Track Dispute Resolution

Standard Procedural Schedule

day	**action**
(2)	Petitioner makes final and good faith demand on respondent
0	Petition is filed and concurrently served on respondent, E.D. and Chief ALJ
7	Response is filed and concurrently served on respondent, E.D. and Chief ALJ
10	Notice of evidentiary hearing (daily calendar)
21	PHC (discovery disputes and non-binding mediation)
31	Evidentiary hearing (ALJ or designee approved by the parties)
47	Issuance of hearing officer's written decision (findings, directions, penalties)
(varies)	Alternate adopted by Commission (potential, only)
66	Effective date of hearing officer's decision, unless Commission has adopted alternate.

Expedited Procedural Schedule

- Available when one carrier claims that another carrier's wrongful act(s) impairs its ability to provide or receive service.

- Triggered by filing of "Petition and Request for Expedited Ruling"

day	action
(2)	Petitioner makes final and good faith demand on respondent
0	Petition and Request for Expedited Ruling is filed & served
3	Response is filed and concurrently served on respondent, E.D. and Chief ALJ
5	ALJ determines whether petition merits expedited ruling. If so,
6	ALJ convenes PHC to set date for evidentiary hearing, conduct mediation, and establish a discovery schedule that requires all exchange to be completed 3 days before hearing. Same discovery rules as above
16	Evidentiary hearing (ALJ or designee approved by the parties)
17	Issuance of hearing officer's written decision (findings, direction, penalties) by fax to the parties
(varies)	Commission adoption of decision
38	Effective date of hearing officer's decision, unless Commission has adopted an alternate.

Emergency Relief Pending Dispute Resolution

- Petition may be filed with a petition to obtain emergency relief from complained of acts.

- Decision on petition within 48 hours of filing

- Decision of presiding officer to grant or deny emergency relief has effect of an order of the Commission and remains in effect pending final Commission action on the underlying action or a subsequent order of the presiding officer or Commission.

Reconsideration and Appeal

Of Hearing Officer's Decision due to procedural failure or error of law or fact

day	**action**
45/17	Issuance of hearing officer's decision
48/20	Aggrieved party files petition for review by Commission
51/23	Response
65/37	Commission may issue alternate to hearing officer's decision
66/38	Hearing officer's decision effective unless Commission has adopted alternate

Of Commission's Decision (not available for emergency orders)

day	**action**
0	Commission decision
15	Application for rehearing filed
30	Response to application for rehearing filed
45	Commission action on application for rehearing (deemed denied)

F. Applicability of performance incentives to Section 271

The use of performance incentives is an integral part of compliance with performance measures that are imposed in conjunction with a Section 271 application by Pacific. Accordingly, any performance incentives plan must include a Section 271 component for the incentives to have meaning in that process.

The CLECs recommend two rules related to Section 271 in connection with their incentive proposal. First, if Section 271 approval has not yet been recommended for Pacific by the CPUC, a Tier II or Tier III violation should result in a denial of such a recommendation. In such a circumstance, the CPUC should not issue a Section 271 approval for Pacific until six months has elapsed without another Tier II or Tier III violation. (Note:

if the CPUC has recommended Section 271 approval but the FCC has not yet acted, the CPUC should withdraw its recommendation for the same six month period.)

Second, if Pacific has received Section 271 approval from the FCC, a Tier III violation should cause the CPUC to undertake an investigation into the question of recommending to the FCC that Pacific's Section 271 approval be suspended.

Certain aspects of the proposed incentive structure (e.g., a two-month, one standard deviation threshold test and considering only a limited set of performance measurement to which incentive payments are applicable) are not acceptable for making the critical determination, in a pre-271 environment, of whether or not Pacific has met its obligations to open the local marketplace to competition. The risks of forestalling competition if Pacific is allowed to provide long distance service before the local marketplace is truly open dwarf the risks of deferring Pacific's long distance entry for some interval in order to be confident that the empirical data truly shows nondiscriminatory provision of resale, UNE, and interconnection services to CLECs. Application of incentive payments, whether Tier I, II or III, may be sufficient to cause reservation regarding a Section 271. However, the incentive measurements are only a subset of the total set of approved measurements. The Section 271 review process of this Commission must consider performance with respect to all adopted performance measurements and the criteria cannot be based upon a design largely intended to limit Pacific's exposure to incentive payments on a month-to-month basis.

G. Exclusive remedy

Monetary performance incentives are not the exclusive remedy available to address Pacific's service problems. CLECs believe that the incentives represent only one of many possible remedies CLECs have available to address Pacific's substandard parity service problems. For example, if Pacific should engage in discriminatory conduct, a CLEC could file a complaint with the Commission for violation of Public Utilities Code ("P.U. Code") §453 and potentially recover damages under §2107 that would be in addition to any monetary performance incentives. Additionally in the event that Pacific should violate a Commission order, a CLEC could also pursue sanctions against Pacific under P.U. Code §701 and §2107 that would be in addition to monetary performance incentives.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
The Development of a National Framework to	)	RM ______
Detect and Deter Backsliding to Ensure	)	
Continued Bell Operating Company Compliance	)	
with Section 271 of the Communications Act	)	
Once In-region InterLATA Relief Is Obtained	)	

COMMENTS OF MGC COMMUNICATIONS, INC.

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March 8, 1999

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COMMENTS OF MGC COMMUNICATIONS, INC.

MGC Communications, Inc. ("MGC"), by its undersigned counsel, hereby submits the following comments in response to the February 1, 1999, Petition for Expedited Rulemaking ("Petition") of Allegiance Telecom, Inc. requesting that the Commission convene a rulemaking proceeding to develop and implement a comprehensive national framework of verifiable rules and performance metrics to measure Regional Bell Operating Company ("RBOC") compliance with section 271 of the Telecommunications Act of 1996. In light of MGC's experience with incumbent local exchange companies ("ILECs"), including GTE and Sprint, MGC unequivocally supports the Allegiance Petition, and encourages the Commission to establish a national framework to ensure that RBOCs comply with their section 271 obligations.

I. INTRODUCTION

MGC is a rapidly growing integrated communications services provider offering facilities-based switched local and long distance voice and data services to small business and residential users. MGC began providing local and long distance service in Las Vegas, Nevada in December 1996 as a switched local exchange service provider and subsequently expanded service in suburban areas of Southern California; Atlanta, Georgia; Chicago, Illinois; and Southern Florida. MGC operates seven regional switches and is currently collocated in 207 central offices, with additional offices projected during 1999. MGC plans to provide service in additional markets in Texas and Ohio in late 1999 and early 2000.

MGC agrees with Allegiance that local exchange competition is being needlessly hindered by the failure of RBOCs to dedicate adequate resources to complying with their obligations under section 271 of the Act. Specifically, ILECs have failed to provide efficient electronic interfaces to their Operations Support Systems ("OSS"), which has resulted in the provisioning process being crippled. The end result is that the ability of CLECs to compete with ILECs on equal footing in the local market is effectively diminished.

MGC submits that the Commission should implement a national framework of performance standards as well as mechanisms to enforce those standards, including penalties, to ensure that performance standards having meaningful consequences. MGC has had considerable experience with UNE ordering and provisioning, and as a result MGC has experienced first-hand the anti-competitive effects of ILEC unpreparededness for meeting their obligations under section 271. Moreover, MGC has witnessed first-hand the ILEC backsliding, and the paralysis the necessarily results when ILECs have obtained regulatory goodies and have no incentive to address their shortcomings. MGC's experience with Sprint is illustrative of what the Commission can expect if strong national measures are not implemented to monitor ILEC performance and to provide for meaningful remedies for violations of those standards.

II. MGC'S EXPERIENCE WITH SPRINT DEMONSTRATES THAT IN THE ABSENCE OF ENFORCEABLE STANDARDS AND PENALTIES ILECs WILL RENEGE ON OBLIGATIONS AND COMMITMENTS

MGC's experience with Nevada/Sprint ("Sprint") provides a forceful example of why it is imperative that this Commission act swiftly to develop a framework to detect and deter RBOC backsliding. Sprint first started providing local loops to MGC in December 1996. From December 1996 until such time as Sprint had a regulatory impetus to remedy the situation, Sprint's error rate for orders either filled late, or with some other problem, was over 42%. Sprint's poor performance in converting and installing both residential and small business accounts continued through January 1998. At that time, Sprint was seeking the approval of the Nevada state commission to provide jointly marketed local and long distance services. However, to obtain such approval for this marketing arrangement, Sprint was required to demonstrate to the Nevada commission that it could support MGC at a level of performance that approached parity. Sprint and MGC entered into a settlement agreement which required Sprint to meet certain minimally acceptable performance levels. Suddenly, Sprint improved its provisioning performance. Sprint was motivated by the "carrot" of state commission approval of its joint marketing arrangement. As demonstrated clearly by Exhibit A hereto, Sprint improved its performance in March and April 1998 to a minimally acceptable level. In May 1998, Sprint obtained its desired authority from the commission. However, immediately thereafter, having received its regulatory approval, and with the incentive to provide service gone, Sprint's performance rapidly began to deteriorate. As Exhibit A again demonstrates, Sprint's improvement from its January 1998 15% error rate to a rate of 3-4% in March and April, returned again to a level of about 15% in July after Sprint had obtained its authority from the Nevada commission.

Predictably, once Sprint received what it was seeking from the Nevada commission, it returned to it pre-approval discriminatory behavior. MGC's experience with Sprint clearly underscores the need for this Commission to promulgate verifiable and enforceable performance standards that are imbued with real deterrents and penalties with teeth in the event that ILECs fail to meet the Commission's standards. These performance problems continue to recur (albeit to a lesser degree at times), driven by the ILEC's inherent lack of motivation to provide product and service on a timely and accurate basis. The ILEC simply has no incentive to do an acceptable job. The poorer the ILEC performance, the greater the likelihood that the ILEC can drive out of the market those carriers with which it competes. This type of behavior is not benign neglect, rather it is conduct for which ILECs (under the Act) can and must be held accountable for meeting appropriate standards and penalized if they fail to perform.

III. NATIONAL MINIMUM PERFORMANCE STANDARDS AND PENALTIES ARE NECESSARY TO DETER BACKSLIDING

Several states have attempted to address the issue of ILEC performance by establishing performance standards and penalties for failure to meet those standards.[1] As Allegiance states in its Petition, both clear and verifiable standards and meaningful penalties are necessary to prevent backsliding. CLECs must have remedies available to be made whole where the anti-competitive effects of poor performance and backsliding are found. In fact, the mere development and implementation of performance measures can lead to a careful examination of the processes, needs and desires of interconnecting companies, which, in turn, can assist the parties in focusing their efforts and in solving problems.

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1 *See e.g.* Interconnection Agreement of Southwestern Bell Telephone and AT&T Communications of the Southwest, Inc., Attachment 17 (April 1, 1998) (hereinafter referred to as "SWBT/AT&T Agreement")(appended hereto as Exhibit B).

Besides Texas, both Nevada and California have made great advances in the development of performance measures and penalties. In both states, detailed Commission-facilitated agreements on performance measures have recently been filed.[2] Such agreements provide for the precise measurement of a wide range of wholesale products, as well as the precise standards which are to be met. Wherever possible, a retail analog/parity process is to be measured for comparison. Where this was deemed impractical for some reason, i.e. lack of equivalent process or difficulty or expense of measuring the most similar process, then a precise benchmark, e.g. 95%, has been set. In those few instances where the parties were unable to agree, a hearing will be held.

Penalties that have a real deterrent effect are integral to the success of a national backsliding framework. This fact has been recognized in both California and Nevada, where it appears that the commisions of both states will be require the establishment of performance penalties.[3] In California, comments have been filed and the Commission presently has the issue before it for decision. (See attached as Exhibit C, the "Simplified Summary of CLEC Performance Incentives Proposal.")

2 The California Performance Incentives are attached as Exhibit C.

3 In Nevada, the Legislature is examining the need for additional Commission authority to set penalties.

IV. CONCLUSION

It is imperative that the Commission adopt ongoing performance standards and meaningful penalties sufficient to ensure compliance with section 271 after an RBOC receives section 271 authority and which applies equally to non-RBOC ILECs. MGC respectfully requests that the Commission convene a rulemaking proceeding to address these issues.

Respectfully submitted,

MGC Communications, Inc.

By: ______________________

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